1971

The Marjorie Webster Decisions on Accreditation

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What does the Marjorie Webster case portend for the future of accreditation in higher education? Will the courts now "remain aloof from the accrediting process" or will they increase their scrutiny of "the standards by which higher education is governed"? The author explores questions raised by the extensive litigation and public debate produced by this tradition-breaking lawsuit.

THE DATE 21 December 1970 marked the end of Marjorie Webster Junior College's prolonged and formidable challenge to the higher educational establishment. On that Monday the United States Supreme Court declined to review a United States Court of Appeals decision reversing the college's trial court victory over the Middle States Association of Colleges and Secondary Schools, thus concluding one of the most historic higher educational battles ever waged in the courts.

The struggle centered on the validity of the nonprofit eligibility criterion adhered to by private regional accrediting agencies. At stake for plaintiff, a small women's college in the District of Columbia offering two-year terminal and transfer courses, was eligibility for accreditation and, beyond that, its future as a proprietary college. For defendant Middle States, the accrediting body for the Middle Atlantic region of the United States, the stakes were, generally, the principle that the affairs of private educational accrediting agencies should be free from judicial interference and, specifically, its policy of accepting an application only from "a nonprofit institution with a governing board representing the public interest." Middle States had relied on this policy for many years prior to the lawsuit, and the policy was adopted in 1964 by the newly formed Federation of Regional Accrediting Commissions of Higher Education for the common use of its members.

Middle States invoked its nonprofit eligibility criterion as the basis for its refusal to consider Marjorie Webster's application for accreditation. The college filed a lawsuit in June 1966 asking that the court order the association to accept its application and evaluate the college. After two and one-half years of preparation, the dispute finally culminated in a ten-week trial in spring 1969. The trial court, the United States District Court for the District of Columbia, issued its opinion in July 1969, upholding all of Marjorie Webster's arguments; 11 months later the United States Court of Appeals for the District of Columbia Circuit reversed.

Background and precedents

Until recently, the sum and substance of judge-made law on educational accreditation could be found in a single case, *North Dakota v. North Central Association of Colleges and Secondary Schools*, decided in

1938.[1] In those days higher education was neither so important nor so widespread as today, and private accrediting agencies were correspondingly less influential. The scope and complexity of higher education have increased greatly since the time of the North Dakota decision, especially after the technological challenge provided by the 1957 Russian Sputnik and the federal government's first giant step into education with the National Defense Education Act of 1958. The ever-increasing number of students seeking entry into an expanding variety of higher educational institutions, to satisfy proliferating employers' demands and parents' expectations, has greatly increased public reliance upon accreditation as the primary indicator of educational quality. Accreditation has become so vital to the success of higher educational institutions that its denial or withdrawal can be disastrous. Accrediting decisions are now clearly worth a vigorous fight and a court case —hence, *Parsons College v. North Central Association of Colleges and Secondary Schools* in 1967[2] and the Marjorie Webster decisions of 1969 and 1970.

Of the three cases—North Dakota, Parsons, and Marjorie Webster—the latter is the most significant. While all three were ultimately decided in favor of the defendant accrediting agency, only the first two exemplify traditional judicial reluctance to interfere with the freedom of private organizations to select or reject members. The district court decision in Marjorie Webster, on the other hand, represents a clear departure from this tradition, and even the court of appeals' overruling opinion contains considerable language suggesting that the tradition's demise may be near at hand for educational accreditation.

The nonprofit eligibility criterion was attacked by Marjorie Webster on three separate legal grounds, each probing principles of great significance to accrediting officials and institutional administrators. The college's first argument was based upon federal antitrust law, the second upon emerging principles of common law, and the third upon the Constitution of the United States. Each argument led the district court to the same conclusion: the nonprofit criterion is arbitrary and unreasonable and, hence, invalid; Middle States should therefore evaluate the college and accredit it *if it otherwise qualifies for accreditation under the association's evaluative criteria.* The court of appeals, hearing the sound of a different drummer, disagreed with this conclusion and rejected each of the college's three arguments.

Sherman Antitrust Act

1. *Antitrust law.* Marjorie Webster contended that Middle States' rejection of its application hindered the operation of the college to such an extent that it created a restraint of trade under the Sherman Antitrust Act. Three premises underlay this argument: the college's activities constituted "trade or commerce" within the purview of the Sherman Act;[3] this "trade" was being restrained by a lack of accreditation; and the argument for the restraint—the nonprofit eligibility criterion—was unreasonable.

The district court accepted all three premises, holding the refusal to evaluate the

[1] 99 F.2d 697 (7th Cir. 1938), *affirming* 23 F. Supp. 694 (E.D. Ill. 1938).

[2] 271 F. Supp. 65 (N.D. Ill. 1967). Between the 1967 Parsons decision and the court of appeals decision in Marjorie Webster, two other accreditation cases filed in the U.S. District Court for the District of Columbia made headlines but were subsequently dismissed: *U.S. School of Music et al. v. National Home Study Council,* Civ. No. 3541–69; *U.S. School of Music et al. v. Finch,* Civ. No. 159–70. A third case in the same court, *American Academy McAllister Institute of Funeral Service, Inc. et al. v. American Board of Funeral Service Education, Inc.,* Civ. No. 1399–69, was also settled, but not until defendant had been preliminarily enjoined from withdrawing accreditation.

[3] 15 U.S.C. §§ 1 and 3 provide that "Every contract, combination . . ., or conspiracy, in restraint of trade or commerce . . . is declared illegal."

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college solely because of its proprietary character to be an unreasonable restraint of trade. This decision, however, was not as sweeping as it might at first have seemed. The court held only that the college, being proprietary, was clearly engaged in "trade" and therefore *it* was protected by the Sherman Act; this reasoning did not specifically extend to *all* private institutions of higher education, nonprofit as well as proprietary, although in reaching its conclusion the district court did favorably discuss the broader proposition that all higher education is within the regulatory scope of the antitrust laws.

The court of appeals rejected both the broader proposition and the narrower proposition. However, it did not reject any of the three premises underlying the college's argument. Instead, it asserted that, the Sherman Act being

> "tailored . . . for the business world," not for the noncommercial aspects of the liberal arts and the learned professions,

its application in the present case would be warranted only if some "commercial motive" had prompted Middle States' reliance on the nonprofit criterion.[4] Absent such a motive,

> the process of accreditation is an activity distinct from the sphere of commerce; it goes rather to the heart of the concept of education itself. We do not believe that Congress intended this concept to be molded by the policies underlying the Sherman Act.[5]

Evolving common law

2. *Common law.* The common law strand of the district court's decision stemmed from a developing exception to the general rule that courts will not compel the granting of membership in a private association. As this exception had previously been explained in relation to accreditation:

> When a private association is the only group operating in an area of vital public concern, it enjoys a sort of monopoly power; if that power, because of public reliance upon it, becomes great enough to make membership a necessity for successful operation in that area, courts may intervene . . . . This principle . . . may well be applicable to educational accrediting associations. [Because] society has come to rely on accreditation as a means of judging the quality of education . . . , and because . . . normally only one agency is recognized in each region or profession—accreditation has become akin to a monopoly power . . . . These factors . . . may render an accrediting agency's admission policies susceptible to judicial scrutiny.[6]

The district court applied this theory to the case and implicitly accepted its corollary: associations possessing monopoly power must exercise it reasonably in the public interest. It found the nonprofit eligibility criterion an unreasonable exercise of monopoly power, invalid as a matter of common law.

Significantly, although the court of appeals rejected this conclusion, it disputed neither the underlying legal principles nor their potential applicability to educational accrediting agencies. Instead, it refined the legal inquiry by focusing upon the amount of "deference" which courts should accord an accrediting agency's exercise of power:

> [T]he extent to which deference is due to the professional judgment of the association will vary both with the subject matter at issue and with the degree of harm resulting from the association's action.[7]

As to the subject matter, the court of appeals characterized the issue as one concerning Middle States' "substantive standards" and accorded more deference to such a professional judgment than it might to

> one concerning the fairness of the procedures by which the challenged determination was reached.[8]

As to the degree of harm, the court admitted that

> deprivation of substantial economic or professional advantages will often be sufficient to warrant judicial action

[4] *Marjorie Webster Jr. College, Inc. v. Middle States Association of Colleges and Secondary Schools, Inc.*, 432 F.2d 650, 654 (D.C. Cir. 1970).

[5] Id. at 655.

[6] William A. Kaplin and J. Philip Hunter, "The Legal Status of the Educational Accrediting Agency: Problems in Judicial Supervision and Governmental Regulation," *Cornell Law Quarterly*, Fall 1966, pp. 113–14.

[7] 432 F.2d at 655–56.

[8] Id. at 656 n. 28.

and found lack of accreditation to be "a not insignificant handicap" to the college.[9] But it disagreed with the district court's conclusion that the college was so harmed by its unaccredited status that accreditation could actually be called "a necessity for [its] successful operation."

These two considerations interjected by the appellate court occasioned the major disagreement between the appellate and the district courts, a disagreement concerning the reasonableness of the nonprofit criterion. Because of its differing view of the subject matter at issue and the degree of harm, the court of appeals accorded greater "deference" to Middle States' judgments than did the district court and thus was less stringent in its application of the reasonableness corollary.

The central question addressed by the litigants and their witnesses was: Does the inherent structure of a proprietary school so adversely affect its educational product that it is reasonable for accrediting agencies to exclude these schools en masse from eligibility for accreditation? Middle States had studied this question in 1957, and its arguments in the Marjorie Webster case were largely drawn from the Meder Report submitted that year at the association's annual meeting. This report argued that a proprietary school's structure, as it involves the pursuit of profit, the possibility of discontinuity due to ownership changes, and the likelihood that the faculty will be mere "employees" subject to dismissal at the owner's will, is incompatible with educational excellence.

The first point, the profit motive, was emphasized most at the trial. Middle States argued that an institution operating for a profit under stockholders' control might not devote the same amount of resources to education as a nonprofit school and might thereby offer an inferior educational product. A long line of eminent witnesses for the college vigorously contested this assumption, and their testimony prompted the district court to make this pronouncement concerning the proprietary school:

> Educational excellence is determined not by the method of financing but by the quality of the program .... [T]he profit motive might result in a more efficient use of resources, producing a better product at a lower price.... Defendant's assumption that the profit motive is inconsistent with quality is not supported by the evidence and is unwarranted. There is nothing inherently evil in making a profit and nothing commendable in operating at a loss.[10]

The appellate court

> neither disregard[ed] nor disbeliev[ed] the extensive testimony ... regarding the values and benefits, both for the educational process and for the country as a whole, that flow from proprietary educational institutions.[11]

But pursuing its determination to "accord substantial deference to ... [Middle States'] judgment," it took a different tack:

> [W]e do not think it has been shown to be unreasonable for ... [Middle States] to conclude that the desire for personal profit might influence educational goals in subtle ways difficult to detect but destructive, in the long run, of that atmosphere of academic inquiry which, perhaps even more than any quantitative measure of educational quality, ... [Middle States'] standards for accreditation seek to foster.[12]

United States Constitution

3. *Constitutional law.* The district court found that accreditation is a "quasi-governmental function" and that Middle States, when engaging in this function, is subject to the restraints of the Constitution—in particular, the due process clause. This finding was based primarily on the role that accrediting agencies play in the distribution of funds under the federal aid-to-education statutes. Middle States and the five other regional associations are officially recognized by the commissioner of education as reliable authorities on the quality of training offered at educational institutions, and the eligibility of these institutions for federal educational aid is normally dependent upon their accredited status. Particularly important to

[9] Id. at 655-56.

[10] *Marjorie Webster Jr. College, Inc. v. Middle States Association of Colleges and Secondary Schools, Inc.*, 302 F. Supp. 459, 468 (D.D.C. 1969).

[11] 432 F.2d at 658.

[12] Id. at 657.

the district court in establishing the quasi-public nature of Middle States' activities was

> evidence disclos[ing] an arrangement between the United States Office of Education and the regional associations relative to the eligibility of institutions which are candidates for but have yet to achieve final accreditation.[13]

Although the district court did not fully explain its use of constitutional due process, the concept would apparently require that the nonprofit criterion have a reasonable factual basis and be reasonably related to the purposes of accreditation. Finding the criterion unreasonable, the court declared it unconstitutional.

Once again, the court of appeals rejected the ultimate conclusion without rejecting the underlying legal principles. It

> assume[d], without deciding, that either the nature of . . . [Middle States'] activities or the federal recognition which they are awarded renders them state action subject to the limitations of the Fifth Amendment [due process clause].[14]

But it gauged reasonableness under the due process clause according to the same refinements employed in its common law analysis, concluding that the college had not proven that the nonprofit criterion "was without reasonable basis."

Impact of the case

What, then, does the Marjorie Webster case portend for the future of accreditation? It does not mean, as some undoubtedly hope, that courts will remain aloof from the accrediting process. Rather, despite the college's ultimate loss on appeal, the history of the case suggests that the standards by which higher education is governed may come under increasing scrutiny by the courts, as well as by the higher educational community itself. The extensive litigation and the public debate it fostered have brought some of the searching questions of governance to the fore.[15] While their solution is a matter initially and primarily for the accrediting agencies themselves, as the court of appeals took great pains to indicate, the courts can nevertheless play an important role when alleged solutions, or their lack, subject institutions or the public to arbitrary and unreasonable exercises of accrediting power.

The Marjorie Webster opinions provide new legal tools for courts to use in fulfilling this role. For the first time, the common law "monopoly" theory has been held to apply to educational accrediting agencies. For the first time, accrediting agencies have been termed (although the appellate court "assume[d] without deciding") quasi-governmental organizations, limited by the Constitution. And even the antitrust laws, whose applicability was largely rejected by the court of appeals, have been accorded a narrow use in situations where an accrediting decision may have been prompted by "commercial motives."

Admittedly, these legal tools were not ultimately weapons of victory for Marjorie Webster. But insofar as the common law and constitutional theories are concerned, loss of the case was due to the appellate court's differing view of the *factual* issues and to subtle differences in gauging the amount of "deference" to be sprinkled upon particular accrediting judgments. In other cases, with different factual records or different accrediting judgments at issue, or simply with slightly less "deferential" courts, the same legal principles could be used to reach different conclusions. Particularly, this might be true where the "subject matter at issue" is a procedure rather than a substantive standard or where the "degree of harm" is more obvious and measurable. On both counts, a case involving the withdrawal of accreditation would be a more likely candidate for judicial scrutiny than a case, such as Marjorie Webster, involving initial refusal.

[13] 302 F. Supp. at 470. "In 1967, . . . [the associations'] practice of attesting to the quality of these institutions through 'letters of reasonable assurance' of accreditation was discontinued when the Office of Education agreed to accept in lieu thereof 'Correspondent Status' listing as evidence of eligibility for assistance." Id.

[14] 432 F.2d at 658.

[15] See James D. Koerner, "The Case of Marjorie Webster," *Public Interest*, Summer 1970, pp. 40–64.

In addition to its impact on the future of accreditation, the Marjorie Webster litigation also has a significant effect on the future of the profit motive in education. Had the district court's decision been affirmed, it would have provided impetus for the entry of the business corporation into the field of higher education, not only in establishing proprietary institutions but also in providing economical supportive services for nonprofit institutions and in pioneering new types of educational ventures. Apparently, such impetus, if there is to be any, must now come from some source other than the courts—it is hoped from the accrediting agencies themselves, but perhaps from other segments of the higher educational community or from the federal government. On this issue, as well as on other critical issues clouding the future of accreditation and all of higher education, the district court's exhortation remains valid:

> In view of the great reliance placed on accreditation by the public and the government, . . . [the regional accrediting] associations must assume responsibility not only to their membership but also to society. There is need for the application of sound standards in the evaluation of all schools and for increased coordination and understanding throughout the educational world. . . . [These] associations . . . have an opportunity to provide new leadership in orienting their policies toward the broader welfare of society and the public interest.[16]

[16] 302 F. Supp. at 470.

The Spectre of Government or Industrial Control

The time has come to take a total look at each of our institutions in some systematic way which relates energy and material input to learning output and relates behavioral objectives to societal needs. If we do not strenuously undertake this task and succeed, then our present troubles in a variety of areas will become far worse. Indeed I do see the spectre of government or even industrial control of our universities and colleges. The latter, by the way, is not impossible in practice. Union Carbide manages research at Oak Ridge for the Atomic Energy Commission, the General Motors Institute is accredited and gives degrees, and some other learning enterprises may be proposed in the future.

—*Frederick deW. Bolman, "The Deficiencies of Institutional Research,"* Institutional Research, *Proceedings of the Higher Education Colloquium, St. Louis, Missouri, 7 October 1970*